

Rule 18, Ariz. R. Crim. Proc.

JURY TRIAL: RIGHT TO JURY TRIAL: *Derendal v. Griffith* test for determining whether a jury trial is required for misdemeanor offense.....Revised 3/2010

Under federal law, a defendant is only entitled to a jury trial if he can receive more than six months of incarceration for conviction of the offense, unless the defendant can show that conviction for the offense carries additional severe statutory penalties. *Blanton v. City of North Las Vegas*, 489 U.S. 538, 542 (1989). In fact, though, no defendant has ever made such a showing. That is, when the incarceration limit is six months or less, “the Court has never been confronted with a case where it has considered the crime’s other potential penalties to be sufficiently serious” to require a jury trial. *U.S. v. Soderna*, 82 F.3d 1370, 1381 (7th Cir. 1996). For example, in *U.S. v. Nachtigal*, 507 U.S. 1, 5 (1993), the Supreme Court held that that there was no right to a jury trial for a federal DUI offense carrying a maximum term of imprisonment for six months, a maximum fine of \$5,000, and a maximum five-year term of probation.

In Arizona courts, however, the right to jury trial is broader than in federal courts. “Arizona has long provided its citizens with greater access to jury trials than is required by the federal constitution.” *State ex rel. McDougall v. Strohson (Cantrell, Real Party in Interest)*, 190 Ariz. 120, 121-122, 945 P.2d 1251, 1253 (1997).

“Jury eligibility focuses on the offense, not the defendant.” *Benitez v. Dunevant*, 198 Ariz. 90, 94, ¶ 11, 7 P.3d 99, 103 (2000). Namely, a defendant is

entitled to a jury trial only for a “serious offenses”, not “petty offenses.”¹
Benitez, 198 Ariz. at 92-93, ¶ 4, 7 P.3d at 101-102 (2000); *State ex rel. Dean v. Dolny*, 161 Ariz. 297, 778 P.2d 1193 (1989), *overruled on other grounds by Derendal v. Griffith*, 209 Ariz. 416, 104 P.3d 147 (2005); *Rothweiler v. Superior Court*, 100 Ariz. 37, 410 P.2d 479 (1966), *overruled on other grounds by Derendal*, 209 Ariz. 416, 104 P.3d 147.

All defendants charged with felony offenses in Arizona are ordinarily entitled to jury trials. Every felony in Arizona ordinarily carries a possible sentence of at least one year of prison. See A.R.S. § 13-702. Such offenses would carry the right to a jury trial in federal court, and in *Duncan v. State of Louisiana*, 391 U.S. 145, 149-150 (1968), the United States Supreme Court held, “[T]he Fourteenth Amendment guarantees a right of jury trial in all criminal cases which – were they to be tried in a federal court – would come within the Sixth Amendment’s guarantee.”

In addition, Article 2, § 23 of the Arizona Constitution states, “[T]he right of trial by jury shall remain inviolate.” This section has been interpreted to mean

¹ The term “petty offense” as used in this context is a term of art meaning any offense not serious enough to warrant a jury trial. This usage is not to be confused with the definition of “petty offense” in A.R.S. § 13-105(27) as “an offense for which a sentence of a fine only is authorized by law.” In the jury trial context, a “petty offense” may carry up to six months of incarceration as well as a fine. See *Benitez v. Dunevant*, 198 Ariz. 90, 93, ¶ 5, 7 P.3d 99, 102 (2000) (“We have used the term “petty” to refer to non- [jury] eligible crimes. The term may cause confusion, however, due to the inconsistency between judicial use and the legislative classification of offenses as ‘petty,’ ‘misdemeanor,’ or ‘felony.’”)

that any defendant who would have been entitled to a jury trial in Arizona before statehood is entitled to a jury trial today. At common law, before Arizona became a state, all felony-level offenses were “serious offenses” punishable by a year or more of incarceration and were jury-eligible. Therefore, every offense classified as a felony in Arizona still requires a jury trial. The right to jury trial for every offense charged as a felony persists even though the penalty for the offense may have changed, as in the case of first-offense felony drug possession cases for which probation is mandatory under A.R.S. § 13-901.01. See generally *State ex rel. Dean v. Dolny*, 161 Ariz. 297, 778 P.2d 1193 (1989), *overruled in part by Derendal*, 209 Ariz. 416, 104 P.3d 147.

Arizona formerly applied a three-part test, established by *Rothweiler v. Superior Court*, 100 Ariz. 37, 42, 410 P.2d 479, 483 (1966), *overruled in part by Derendal*, 209 Ariz. 416, 104 P.3d 147, to determine if a nonfelony offense required a jury trial. Under *Rothweiler*, the courts had to consider three factors, any one of which would independently require a jury trial: (1) the severity of the penalty that could be inflicted for the offense; (2) the moral quality of the act; and (3) the relationship of the act to common-law crimes. *Id.*

However, in *Derendal v. Griffith*, 209 Ariz. 416, 104 P.3d 147, the Court overruled *Rothweiler* in part, abolishing the “moral quality” prong of the *Rothweiler* test. *Derendal*, who was charged in Phoenix Municipal Court with drag racing, a misdemeanor punishable by a maximum of 6 months in jail and a \$2,500 fine, demanded a jury trial. The city court denied him a jury trial and the

case eventually went to the Arizona Supreme Court. That Court stated that two provisions of the Arizona Constitution give certain defendants the right to a jury trial. Art. 2, § 23, states, “[T]he right of trial by jury shall remain inviolate,” and Art. 2, § 24 states, “[I]n criminal prosecutions, the accused shall have the right to . . . a speedy public trial by an impartial jury” These provisions do not independently grant the right to a jury trial. Instead, these provisions preserve the right to jury trial that existed before statehood, when only defendants accused of “serious offenses” were entitled to jury trials. *Id.* at 419, 104 P.3d at 150. Thus, the question of jury eligibility in Arizona requires an inquiry into the seriousness of the offense.

The *Derendal* Court held that Art. 2, § 23 required the Court to retain the first prong of the *Rothweiler* test, “relationship to common law crimes.” When an offense was jury-eligible before statehood, the right carries over to modern statutory offenses of the same “character or grade.” *Id.* Arizona abolished all common law crimes in 1978, and many statutory offenses now have “no precise analog in the common law.” The Court explained, “We regard a jury-eligible, common law offense as an antecedent of a modern statutory offense when the modern offense contains elements comparable to those found in the common law offense.” *Id.* As an example, the *Derendal* court cited *Urs v. Maricopa County Attorney's Office*, 201 Ariz. 71, 31 P.3d 845 (App. 2001), which held that reckless driving was a jury-eligible offense at common law and, therefore, found that all misdemeanor reckless driving defendants in Arizona were entitled to jury trials. *Derendal*, 209 Ariz. at 419, 104 P.3d at 150. Compare *Benitez v.*

Dunevant, 198 Ariz. 90, 94, ¶ 12, 7 P.3d 99, 103 (2000) (Offense of driving on a DUI-suspended license has no common-law antecedent and is not jury eligible).

If a statutory offense does not have a common law antecedent, Art. 2, § 24 of the Arizona Constitution determines whether the defendant has a right to jury trial. Because that constitutional section is Arizona’s analog to the Sixth Amendment, the courts have construed Art. 2, § 24 to preserve the right to jury trial only for serious crimes, not for petty offenses. *Id.*

In contrast to the former *Rothweiler* test, the U.S. Supreme Court uses a simple test for determining jury eligibility. The Federal test focuses on the length of the potential sentence. However, a defendant could rebut this *Blanton* presumption by showing that the legislature had attached other “onerous penalties” to the offense. *Id.* at 421, 104 P.3d at 152.

In *Derendal*, the Arizona Supreme Court expressly adopted the presumption of *Blanton v. City of North Las Vegas*, 489 U.S. 538, 543 (1981), that “any offense for which the maximum statutory penalty is less than six months incarceration is presumptively a petty offense to which the right of trial by jury does not attach.” *Derendal*, 209 Ariz. at 421, 104 P.3d at 152. The *Derendal* Court held that when the legislature classifies an offense as a misdemeanor carrying no more than six months of incarceration, the courts will “presume that offense to be a petty offense that falls outside the jury requirement of Article 2, Section 24 of the Arizona Constitution.” *Id.* at 422, 104 P.3d at 153. This

approach leaves the legislature with the primary responsibility for determining whether an offense is “serious.” *Id.*

Still, an Arizona misdemeanor defendant can rebut that modified *Blanton* presumption and establish that a misdemeanor offense is “serious” by making three showings. “First, the penalty must arise directly from statutory Arizona law.” That is, the court need not consider consequences that flow from federal law, non-statutory sources, or “societal repercussion[s].” *Id.* The Court expressly overruled *State ex rel. Dean v. Dolny*, 161 Ariz. 297, 778 P.2d 1193 (1989), insofar as that case came to a different conclusion regarding “grave consequences.” *Id.*

“Second, the consequence must be severe,” that is, it must “approximate in severity the loss of liberty that a prison term entails.” *Id.* at 423, 104 P.3d 154 [internal quotations omitted]. The Court explained that it had previously held that a \$1,000 fine or potential loss of a liquor license was insufficient to prove seriousness. *Id.*, citing *State ex rel. Baumert v. Superior Court*, 127 Ariz. 152, 155, 618 P.2d 1078, 1081 (1980); *Spitz. v. Municipal Court*, 127 Ariz. 405, 408, 621 P.2d 911, 914 (1980).

Third, the courts will consider “only those consequences that apply uniformly to all persons convicted of a particular offense,” rather than the impact a conviction might have on a particular defendant. *Id.* Accordingly, the court will not consider the effect a conviction might have on a defendant’s ability to obtain

or maintain a professional license, “as such a consequence does not affect all defendants convicted of an offense.” *Id.*

The *Derendal* Court reasoned that this modified *Blanton* test “preserves the right to jury trial for serious offenses, while recognizing the legislature’s primary responsibility for classifying crimes as to severity. We also retain a defendant’s right to a jury trial for a misdemeanor offense if the defendant can establish that conviction results in additional severe, direct, uniformly applied, statutory consequences.” *Id.*

The *Derendal* Court expressly rejected the “moral quality” prong of the *Rothweiler* test, finding that the test was not constitutionally required and had led to inconsistent enforcement. *Id.* at 424, 104 P.3d at 155. Applying this test, the Court found that the misdemeanor offense of drag racing was not jury eligible. *Id.*